UNITED STATES DISTRICT COURT
SOUTHERN DISTRICT OF FLORIDA

CASE NO. 80-530-Cr-SMA

UNITED STATES OF AMERICA,

Plaintiff,

vs.

VICTOR MANUEL STUART CABALLERO,

Defendant.

ORDER DENYING DEFENDANT'S MOTION TO DISMISS

THIS CAUSE came before the Court on the Defendant VICTOR MANUEL STUART CABALLERO'S Motion to Dismiss the indictment. Defendant's motion challenges the constitutionality of 21 U.S.C. § 955a(a), asserting, inter alia, that Congress lacks authority to declare criminal extraterritorial acts which have no nexus to the United States.

The Court's review of the law applicable to Defendants' constitutional challenge to this statute persuades the Court that 21 U.S.C. § 955(a) is

constitutional and that Defendants' constitutional challenge must fail. Specifically, the Court finds that Congress does have authority, pursuant to Article I, Section 8 and Article III, Section 2 of the Constitution, to enact such legislation within the statutory framework of The Comprehensive Drug Prevention and Control Act of 1970. See United States v. Baker, 609 F.2d 134 (5th Cir. 1980), and cases cited therein; see also United States v. Warren, 578 F.2d 1058 (5th Cir. 1978). The Court further notes that Defndants herein were apprehended aboard a Unitd States flag vessel. See United States v. Bowman, 260 U.S. 94 (1922). The Court finds Defendant's other arguments to be equally without merit. Accordingly, it is

ORDERED AND ADJUDGED that Defendant's Motion to Dismiss be, and

the same hereby is, DENIED.

DONE AND ORDERED in Chambers at Miami, Florida, this 6 day of January, 1981.

/s/ Sidney M. Aronovitz
UNITED STATES DISTRICT JUDGE

Copies furnished to:
Stephen J. Bronis, Esq.
Sonia Escobio-O'Donnell, AUSA

UNITED STATES of America,
Plaintiff-Appellee,

v.

Victor Manuel STUART-CABALLERO,
Amador Ortega and Armando Arias
Diaz, Defendants-Appellants.

No. 81-5607.

United States Court of Appeals,
Eleventh Circuit.

Sept. 24, 1982.

Defendants were convicted in the United States District Court for the Southern District of Florida, Sidney M. Aronovitz, J., of possession of marijuana on American vessel with intent to distribute, and defendants appealed. The Court of Appeals held that: (1) the United States could, consistent with international law and due process, extend its criminal narcotics laws to vessels on high seas, even absent proof of intent to distribute narcotics in the United States; (2) defendants had no reasonable expectation of privacy in

areas where marijuana was found, and search and subsequent seizure were proper; (3) prosecutor's comments that "The defendants may or may not have a different version [of the case]. This is the Government's version" and "They didn't answer that question to your satisfaction * * * They didn't answer it at all" did not constitute improper comment on defendants' exercise of right not to testify; (4) evidence sufficiently showed that vessel was vessel of the United States on date in question; and (5) evidence did not merely show that defendants were present on vessel near marijuana but was sufficient to establish possession on the vessel with intent to distribute.

Affirmed.

Donald I. Bierman, Benedict P. Kuehne, Miami, Fla., for defendants-appellants.

Paul Morris, Miami, Fla., for Ortega and Diaz.

Robert J. Bondi, Asst. U.S. Atty., Miami, Fla., for plaintiff-appellee.

Appeals from the United States District Court for the Southern District of Florida.

Before VANCE and JOHNSON, Circuit Judges, and ALLGOOD*, District Judge.

PER CURIAM:

Appellants were convicted after trial by jury of one count of possession of marijuana on an American vessel with intent to distribute, in violation of 21 U.S.C. §955a and 18

* Honorable Clarence W. Allgood, U.S. District Judge for the Northern District of Alabama, sitting by designation.

U.S.C. §2. There is no merit to any of the contentions raised on appeal, and we therefore affirm.

While on patrol in international waters south of Florida on the night of October 8, 1980, a Coast Guard cutter spotted a ship on radar. The Coast Guard moved to intercept the ship and, with seamen training a large spotlight on the ship's stern, identified it as the THOMAS E, out of Norfolk, Virginia. The cutter's captain decided to board the THOMAS E, but the three crewmen on board the THOMAS E doused all lights and attempted evasive action. A high seas chase ensued, continuing until the cutter managed to disable the vessel with cannon fire nine hours later. Throughout the chase, seamen using nightscopes kept continuous surveillance of the ship, but never saw more than three people aboard. Once the THOMAS E

was disabled, a boarding crew was sent to search the ship. Before boarding, the crew could smell the strong odor of marijuana coming from the ship. The three persons on board were arrested and a general search uncovered more than 21,600 pounds of marijuana stored in the engine room and two forward cargo holds.

On appeal appellants first challenge the constitutionality of section 955a. They argue that the United States cannot, consistent with international law and due process, extend its criminal narcotics laws to vessels on the high seas absent proof of an intent to distribute the narcotics in the United States. This argument was foreclosed by recent decisions of this court. In United States v. Marino-Garcia, 679 F.2d 1373 (11th Cir. 1982); United States v. Liles, 670 F.2d 989 (11th Cir. 1982), and United States v.

Riker, 670 F.2d 987 (11th Cir. 1982), we rejected similar challenges to the constitutionality of section 955a. Appellants also contend that the statute is unconstitutional because it does not require a showing of voluntary or knowing possession of the controlled substance. The very terms of section 955a belie this contention, however, because the statute requires a showing of possession with intent to distribute. The district court properly overruled defendants' motion to dismiss the indictment.

Appellant Stuart-Caballero contests the validity of the stop, search, and seizure of the THOMAS E because the government failed to show there was probable cause that criminal activity was occurring. Assuming there was no probable cause to believe a crime was being committed, a debatable point

in light of the attempted flight, the Coast Guard has plenary authority to stop and board American vessels on the high seas. 14 U.S.C. §89(a). Such a search may be for the purposes of ascertaining compliance with safety, documentation, customs, or narcotics laws and the Coast Guard needs neither probable cause nor reasonable suspicion to board. United States v. Mazyak, 650 F.2d 788, 790 (5th Cir. 1981), cert. denied, ____ U.S. ____, 102 S.Ct. 1281, 71 L.Ed.2d 464 (1982). Once on board, the Coast Guard has the authority to search all common areas of the ship. United States v. DeWeese, 632 F.2d 1267, 1270-71 (5th Cir. 1980), cert. denied, ____ U.S. ____, 102 S.Ct. 368, 70 L.Ed.2d 188 (1981). There being no reasonable expectation of privacy in the areas where the marijuana was found, the search and subsequent seizure were

proper.

Appellants Ortega and Diaz contend that the prosecutor committed reversible error when he improperly commented on their decision not to testify. The prosecutor uttered two statements that form the basis for this contention. First, in opening argument the prosecutor said:

> The defendants may or may not have a different version [of the case]. This is the Government's version.

Later, when attacking the testimony of the one defendant who did testify, the prosecutor rhetorically asked why the witness failed to explain the possible reasons a mysterious fourth person would allow three strangers to board a boat loaded with $5.5 million worth of marijuana. The prosecutor then said:

> They didn't answer that question to your satisfaction, ladies and gentlemen. They didn't answer

it at all.

It is clear that a prosecutor may not comment on a defendant's exercise of his right not to testify at his trial. Griffin v. California, 380 U.S. 609, 85 S.Ct. 1229, 14 L.Ed.2d 106 (1965). In this circuit, improper prosecutorial comment may be established by showing that: (1) the prosecutor manifestly intended to comment on the defendant's silence, or (2) the character of the comment was such that a jury would naturally and necessarily construe it as a comment on the defendant's silence. United States v. Harbin, 601 F.2d 773, 777 (5th Cir.), cert. denied, 444 U.S. 954, 100 S.Ct. 433, 62 L.Ed.2d 327 (1979). Neither test was met in this case. First, appellants failed to show improper motive on the part of the government. Second, the comments, when taken in context, were mild assertions

that could not reasonably be construed as improper comment. In his comment during summation, the prosecutor was merely attacking the credibility of one witness when he carelessly used the word "they". The comment during opening argument was even less objectionable. The district court three times instructed the prosecutor to refer to "the government's version" of the evidence, so the complained of statement can only reasonably be viewed as a response to the court's orders, and not an improper comment. See id.

Appellant Stuart-Caballero argues that the government failed to prove that on the date in question the THOMAS E was a vessel of the United States. The evidence showed that at the time of appellants' arrest the vessel bore on its stern the words "THOMAS E NORFOLK VA." The evidence also included

a certified copy of its certificate of United States registry issued by the Coast Guard in Miami, Florida on May 13, 1980, less than five months from the date of appellants' arrest.

Under a comprehensive federal system of regulation of trading and fishing vessels, eligible ships that engage in trade with foreign lands are registered under a documentation procedure established in the Act of December 31, 1972., 1 Stat. 287 and now codified in 46 U.S.C. ch.2. "The purpose of a register is to declare the nationality of a vessel ... and to enable her to assert that nationality wherever found." The Mohawk, 70 U.S. (3 Wall.) 566, 571, 18 L.Ed. 67 (1866), quoted in Douglas v. Seacoast Products, Inc., 431 U.S. 265, 272-73, 97 S.Ct. 1740, 1745, 52 L.Ed.2d 304 (1977) and Anderson v. Pacific Coast Steamship Co., 225 U.S.

187, 199, 32 S.Ct. 626, 56 L.Ed. 1047 (1912). A ship so registered is a "vessel of the United States" and retains that status until the documentation is surrendered with approval of the Secretary of Transportation. Merchants National Bank v. Ward Rig No. 7, 634 F.2d 952, 955-57 (5th Cir. 1981); 46 U.S.C. §911. Registration of the THOMAS E was a temporary registration issued at a port other than its home port. The temporary status is of no present significance, however, and simply requires that its registration document be surrendered within ten days of its arrival at its home port of Norfolk, 46 C.F.R. §67.35, the only port where its permanent documents can be issued. 46 C.F.R. §67.19.

The name and home port of every documented vessel must be marked on its stern in letters of prescribed

type, color and size. 46 U.S.C. §46; 46 C.F.R. §67.13-1. At the time of appellants' arrest, the THOMAS E bore the same name and home port on its stern as on its May 13, 1980 registration certificate.

The force of such evidence is dealt with by Wigmore as follows:

> When the existence of an object, condition, quality, or tendency at a given time is in issue, the prior existence of it is in human experience some indication of its probable persistence or continuance at a later period.
>
> The degree of probability of this continuance depends on the chances of intervening circumstances having occurred to bring the existence to an end. The possibility of such circumstances will depend almost entirely on the nature of the specific thing whose existence is in issue and the particular circumstances affecting it in the case in hand. That a soap bubble was in existence half an hour ago affords no inference at all that it is in existence now; that Mt. Everest was in existence ten years ago is

> strong evidence that it exists yet; whether the fact of a tree's existence a year ago will indicate its continued existence today will vary according to the nature of the tree and the conditions of life in the region. So far, then, as the interval of time is concerned, no fixed rule can be laid down; the nature of the thing and the circumstances of the particular case must control.

2 Wigmore, Evidence §437(1) (Chadbourn rev.1979) (emphasis in original) (footnote omitted).

Stuart-Caballero misplaces reliance on United States v. Platenburg, 657 F.2d 797 (5th Cir. 1981), in which Unit A of the fifth circuit held after September 30, 1981, that a seven year old certificate was not sufficient by itself to establish FDIC coverage. Continued FDIC insurance coverage, however, depends on periodic payment of premiums. See United States v. Brown, 616 F.2d 844, 848 (5th Cir. 1980).

1980). Applying the logic of Wigmore it is apparent that a vessel registration less than five months old creates a very different probability of continuance than does an FDIC certificate that is several years old. Even so, United States v. Maner, 611 F.2d 107 (5th Cir. 1980), a case that is binding authority in this circuit, holds that a five year old certificate coupled only with evidence of a bank's continued display of copies of the certificate at the time of trial constituted sufficient proof of coverage.

The evidence before us is much stronger. We have no difficulty in concluding that the THOMAS E was proved to be a vessel of the United States.

Finally, all three appellants contend that the evidence was also insufficient to establish anything more than their mere presence near the

contraband. The evidence showed: (1) Ortega's story notwithstanding, only three persons were aboard the THOMAS E; (2) the ship had nearly eleven tons of marijuana aboard and all defendants had to be aware of it given its pervasive odor, (3) more than one person was needed to load and off-load the large quantity of marijuana on board; and (4) the attempted flight evinced guilty knowledge. More than mere presence has been established in this case. The evidence is more than sufficient to sustain the jury's verdict. See United States v. Liles, 670 F.2d at 992-93; United States v. Riker, 670 F.2d at 989; United States v. Mazyak, 650 F.2d at 790-91 & n.2.

AFFIRMED.